

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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REBEL COMMUNICATIONS, LLC,

Plaintiff,

v.

VIRGIN VALLEY WATER DISTRICT;  
*et al.*,

Defendants.

2:10-CV-0513-LRH-GWF

ORDER

Before the Court are three Motions for Summary Judgment regarding the obligations and boundaries of certain contracts to build telecommunications towers in Clark County, Nevada. Defendant the City of Mesquite (“the City”) filed the first Motion for Summary Judgment. Doc. #192.<sup>1</sup> Plaintiff Rebel Communications, LLC (“Rebel”) filed an Opposition (Doc. #208), to which the City replied (Doc. #226). Defendant Virgin Valley Water District (“VVWD”) filed a Motion for Partial Summary Judgment. Doc. #193. Rebel filed an Opposition (Doc. #196), to which VVWD replied (Doc. #210). Rebel also filed a Motion for Partial Summary Judgment. Doc. #194. VVWD filed an Opposition (Doc. #206), to which Rebel replied (Doc. #228).

Also before the Court is Defendants’ Motion to Exclude Opinions and Testimony of Rebel’s expert Eric C. Frye. Doc. #198; Doc. #200. Rebel filed an Opposition (Doc. #215), to which Defendants replied (Doc. #220; Doc. #221).

<sup>1</sup> Refers to the Court’s docket number

1 **I. Facts and Procedural Background**

2 **A. White Rock Site**

3 In 2005, the City decided to build a communications tower to ensure that city departments  
4 could maintain access to radio communications. In May 2006, the City paid Rebel to conduct a  
5 coverage study to determine the best location for the tower, taking into account that the tower  
6 would be utilized by multiple city departments. Rebel and the City determined that a location  
7 referred to as the “white rock site” would be ideal for the communications tower. This site was  
8 managed by VVWD pursuant to a right of way agreement with the Bureau of Land Management  
9 (“BLM”) dated August 24, 1999. After Rebel completed its coverage study, the City, on February  
10 8, 2007, drafted a Request for Proposal for construction of a City-owned communications tower at  
11 the white rock site.

12 On March 6, 2007, Rebel principal Cody Whipple (“Whipple”) presented a proposal to  
13 VVWD to construct a Rebel-owned communications tower at the white rock site. Rebel and  
14 VVWD entered into a Lease of Real Property for Telecommunication Tower on April 15, 2007.  
15 The lease agreement stated an obligation for Rebel to “comply with all statutes, ordinances,  
16 regulations, and requirements of all federal, state, county, and local governmental entities.” Doc.  
17 #192, Ex. 18 at 3. The lease agreement also represented that the white rock site was “not subject to  
18 any administrative order, judgment or decree, including any order concerning wetlands or  
19 endangered or threatened species,” and stated that VVWD could not enter into “any leases or  
20 agreements affecting the leasing or management of the Improvements without [Rebel’s] consent.”  
21 *Id.* at 5-6. Rebel states that it was never informed that the land encompassing the white rock site  
22 was actually owned by the BLM. The lease agreement does not state that BLM owns the land, but  
23 Section 24 discusses the situations in which the BLM could terminate the agreement.<sup>2</sup>

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26 <sup>2</sup> The lease agreement included an integration clause, stating that it contained “the entire understanding of the parties.” Doc. #192, Ex. 18 at 4-5.

1 In November 2007, Whipple approached Mesquite's City Manager Tim Hacker ("Hacker")  
2 to inquire whether the City wanted to lease space on its communications tower at the white rock  
3 site. After months of discussion and review of a cost-benefit analysis, on January 25, 2008, the  
4 City told Rebel that it would not lease space on the white rock site from Rebel. The BLM did not  
5 learn about Rebel's construction of a communications tower at the white rock site until early 2008,  
6 and at that time informed VVWD that this construction violated the VVWD's limited right of way  
7 at the site.

8 On April 29, 2008, the BLM issued a cease and desist order concerning Rebel's  
9 communications tower at the white rock site. On June 17, 2008, the BLM issued Rebel a trespass  
10 notice for unauthorized construction of a communications tower at the white rock site. The  
11 trespass notice advised Rebel that it had committed two violations: (1) occupancy of public land  
12 without authorization, lease, or right of way for the purpose of establishing a communications  
13 facility; and (2) construction of a communication facility within an Area of Environmental Concern  
14 ("ACEC"). *Id.*, Ex. 10. The notice requested that Rebel remove the tower, and all equipment  
15 associated with it, and apply for a communications site outside of the ACEC. *Id.*

16 On February 14, 2008, the VVWD requested an amendment to its right of way to allow for  
17 a communications tower. This request noted that the tower at the white rock site would be  
18 "operated by VVWD with no commercial uses occurring," and that the tower would be "shared by  
19 public safety and critical infrastructure providers in public sectors and all levels of government."  
20 *Id.*, Ex. 4. In February 2010, the BLM and VVWD reached a settlement agreement that expanded  
21 VVWD's right of way and permitted the communications tower to remain only if full ownership  
22 remained with VVWD. On February 9, 2010, the BLM provided Rebel a one-month extension of  
23 time to remove its communications tower at the white rock site. On February 22, 2010, the VVWD  
24 board voted to terminate the white rock site lease agreement between Rebel and VVWD.

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1           **B. Scenic Tank Site**

2           On February 19, 2008, VVWD approved the City's request to construct a communications  
 3 tower at another location referred to as the "scenic tank site." In March 2008, VVWD informed the  
 4 City that it could not approve a tower at the scenic tank site until the BLM made a final decision  
 5 about Rebel's tower on the white rock site. *Id.*, Ex. 6. The VVWD referred the City to the BLM  
 6 for discussion of its rights, and on May 1, 2008, the City and VVWD entered into an agreement for  
 7 construction of a communications tower at the scenic tank site. On September 26, 2008, the City  
 8 and BLM entered into a communication use agreement for a communications tower at the scenic  
 9 tank site. The City's agreements with VVWD and the BLM limited the City's use of the scenic  
 10 tank tower to the City's fire and safety departments, and prohibited the City from leasing or renting  
 11 the scenic tank site to any other entity, public or private. In April 2010, the City requested that  
 12 VVWD agree to an amendment of its cooperative agreement for use of the scenic tank site to  
 13 permit other public entities to use the communications tower. This request was approved on May  
 14 4, 2010. Thereafter, the City negotiated cooperative agreements and interlocal agreements with  
 15 Clark County, the Las Vegas Metropolitan Police Department, and the State of Nevada.

16           **C. Procedural Background**

17           Rebel filed a Complaint against Defendants on April 9, 2010, and an Amended Complaint  
 18 on September 24, 2010. Doc. #1; Doc. #70. The Amended Complaint alleges thirteen causes of  
 19 action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3)  
 20 fraudulent inducement; (4) intentional interference with contractual relations; (5) intentional  
 21 interference with prospective economic advantage; (6) procedural due process violations under 42  
 22 U.S.C. § 1983; (7) civil conspiracy; (8) concert of action; (9) inverse condemnation; (10) pre-  
 23 condemnation; (11) conversion; (12) declaratory relief; and (13) takings clause violation under 42  
 24 U.S.C. § 1983. Doc. #70. On March 20, 2012, the Court granted Defendants' Motion to Dismiss  
 25 as to individual defendants Robert Smith, Karl Gustaveson, and Timothy R. Hacker.<sup>3</sup> Doc. #116.

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<sup>3</sup> The Court denied Rebel's Motion for Reconsideration on August 1, 2012. Doc. #128.

1 On September 5, 2013, VVWD filed a Counterclaim for declaratory judgment on all of Rebel's  
2 state law claims. Doc. #172. The parties filed the present Motions for Summary Judgment on  
3 February 2, 2015 (Doc. #192; Doc. #193; Doc. #194), and VVWD filed its Motion to Exclude  
4 Expert Testimony on February 19, 2015 (Doc. #198).

## 5 **II. Legal Standard**

6 Summary judgment is appropriate only when the pleadings, depositions, answers to  
7 interrogatories, affidavits or declarations, stipulations, admissions, and other materials in the record  
8 show that “there is no genuine issue as to any material fact and the movant is entitled to judgment  
9 as a matter of law.” Fed. R. Civ. P. 56(a). In assessing a motion for summary judgment, the  
10 evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the  
11 light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio*  
12 *Corp.*, 475 U.S. 574, 587 (1986); *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154  
13 (9th Cir. 2001). A motion for summary judgment can be complete or partial, and must identify  
14 “each claim or defense—or the part of each claim or defense—on which summary judgment is  
15 sought.” Fed. R. Civ. P. 56(a).

16 The party moving for summary judgment bears the initial burden of informing the court of  
17 the basis for its motion, along with evidence showing the absence of any genuine issue of material  
18 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the  
19 burden of proof, the moving party must make a showing that no “reasonable jury could return a  
20 verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On  
21 an issue as to which the nonmoving party has the burden of proof, however, the moving party can  
22 prevail merely by demonstrating that there is an absence of evidence to support an essential element  
23 of the non-moving party's case. *Celotex*, 477 U.S. at 323.

24 To successfully rebut a motion for summary judgment, the nonmoving party must point to  
25 facts supported by the record that demonstrate a genuine issue of material fact. *Reese v. Jefferson*  
26 *Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). A “material fact” is a fact “that might affect

1 the outcome of the suit under the governing law.” *Liberty Lobby*, 477 U.S. at 248. Where  
2 reasonable minds could differ on the material facts at issue, summary judgment is not appropriate.  
3 *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute regarding a material fact is considered  
4 genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving  
5 party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a scintilla of evidence in support of  
6 the party’s position is insufficient to establish a genuine dispute; there must be evidence on which a  
7 jury could reasonably find for the party. *See id.* at 252. “[S]peculative and conclusory arguments  
8 do not constitute the significantly probative evidence required to create a genuine issue of material  
9 fact.” *Nolan v. Cleland*, 686 F.2d 806, 812 (9th Cir. 1982).

10 When considering cross-motions for summary judgment, courts “must review the evidence  
11 in support of each cross-motion.” *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*,  
12 249 F.3d 1132, 1136 (9th Cir. 2001). However, in determining whether to grant or deny summary  
13 judgment, it is not a court’s task “to scour the record in search of a genuine issue of triable fact.”  
14 *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotation marks omitted). Rather, a  
15 court is entitled to rely on the nonmoving party to “identify with reasonable particularity the  
16 evidence that precludes summary judgment.” *Id.*

### 17 **III. Discussion**

#### 18 **A. The City’s Motion for Summary Judgment**

19 Rebel alleged four claims against the City: (1) intentional interference with contractual  
20 relations; (2) intentional interference with prospective economic advantage; (3) civil conspiracy;  
21 and (4) concert of action. Doc. #70. The City moves for summary judgment on all four of these  
22 claims. Doc. #192 at 1.

#### 23 **1. Intentional Interference Claims**

24 The City argues that Rebel cannot prevail on its intentional interference claims because any  
25 contract between Rebel and VVWD was not valid, and even if it were, Rebel cannot establish that  
26 the City had an improper tortious motive. Rebel argues that the City has not established that the

1 undisputed material facts show that the City did not intend to act in a manner that would harm  
2 Rebel, or that the City's actions were not tortious.

3 To prevail on a claim for intentional interference with contractual relations in Nevada, "a  
4 plaintiff must establish: (1) a valid and existing contract; (2) the defendant's knowledge of the  
5 contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual  
6 disruption of the contract; and (5) resulting damage." *J.J. Indus. LLC v. Bennett*, 71 P.3d 1264,  
7 1267 (Nev. 2003). Additionally, "the plaintiff must establish that the defendant had a motive to  
8 induce breach of the contract with the third party." *Id.* at 1268 (citing *Nat'l Right to Life Political*  
9 *Action Comm. v. Friends of Bryan*, 741 F. Supp. 807, 814 (D. Nev. 1990)). An actor's  
10 "interference with the other's prospective contractual relation is intentional if the actor desires to  
11 bring it about or if he knows that the interference is certain or substantially certain to occur as a  
12 result of his action." *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nev.*, 792  
13 P.2d 386, 388 (Nev. 1990) (citing Restatement (Second) Torts § 766B (1979)). To determine  
14 whether a defendant's interference is improper, courts consider:

15 (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the  
16 other with which the actor's conduct interferes, (d) the interests sought to be advanced  
17 by the actor, (e) the social interests in protecting the freedom of action of the actor  
and the contractual interests of the other, (f) the proximity or remoteness of the actor's  
conduct to the interference and (g) the relations between the parties.

18 *Nationwide Trans. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1055 n.3 (9th Cir. 2008) (quoting  
19 Restatement (Second) of Torts § 767).

20 Rebel raises a number of facts that it contends indicates that the City had an improper  
21 motive to interfere with its existing contract and prospective economic advantage, including: (1)  
22 the City dragged its feet for years before deciding to build a communications tower; (2) no member  
23 of the City, including Hacker, expressed concerns about the BLM's power over the white rock site;  
24 (3) the City demanded ownership of the white rock site in December 2007; (4) Whipple was  
25 warned about Hacker's motives; (5) the BLM only investigated Rebel's tower at the white rock site  
26 after the City threatened to exert its ownership; and (6) BLM and VVWD worked for months to

1 cure Rebel's trespass and allow Rebel to manage the white rock site. Doc. #208 at 17-18. Rebel  
2 also raises facts to dispute the City's arguments that Rebel's management of the communications  
3 tower at the white rock site could be unsafe or prohibitively expensive, including: (1) that Hacker  
4 did not contest Rebel's management of the white rock site until Whipple denied the City  
5 ownership; (2) the white rock site is in fact professionally managed; (3) Rebel's management of the  
6 white rock site was acceptable to the VVWD; and (4) BLM's trespass notice did not involve safety  
7 violations, but rather VVWD's right of way involving a potential area of environmental concern.  
8 *Id.* at 18.

9 The City argues that Rebel's intentional interference claim must fail because the contract  
10 between VVWD and Rebel was not valid. In particular, the City emphasizes that Rebel failed to  
11 obtain permission from the BLM—or acquire other required permits—to build its communications  
12 tower despite knowledge that the white rock site included public land. Although this was arguably  
13 deficient,<sup>4</sup> the Court previously stated that “[a] claim for interference with prospective economic  
14 advantage does not require the existence of a valid contract.” Doc. #69 at 3 (citing *Korea Supply*  
15 *Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 953 (Cal. 2003)). The Court finds again that even if  
16 the VVWD/Rebel contract was invalid, this would not extinguish a claim for intentional  
17 interference against the City.

18 The City argues convincingly that it decided to build its own tower for practical and  
19 economic reasons—mainly that it would be cheaper for the City to operate its own tower—not  
20 based on a motive to interfere with Rebel's contract with the VVWD. However, Rebel has  
21 identified evidence to create a genuine dispute of material fact as to whether the City had an  
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23 <sup>4</sup> Although the lease agreement does not explicitly state that Rebel had an obligation to request  
24 permission from the BLM, it did state that Rebel had to “comply with all statutes, ordinances, regulations, and  
25 requirements of all federal, state, county, and local government entities.” Doc. #193, Ex. A at 3. Additionally,  
26 Rebel claims that VVWD represented that it was the owner of white rock site, but the lease agreement provided  
that “if the BLM terminates [VVWD's] permit covering the premises, the BLM shall succeed to the right, title,  
and interest of [VVWD] hereunder, and the BLM shall have the unilateral right to terminate this Agreement  
any time thereafter.” *Id.* at 6.

1 improper motive and took affirmative steps to influence the BLM to take actions that would  
 2 dissolve the VVWD/Rebel contract. First, Whipple testified that Hacker demanded full ownership  
 3 of the white rock site, and indicated that he would attempt to agitate Rebel's relationship with the  
 4 VVWD and BLM if Rebel did not comply. Doc. #207, Ex. 1(b) at 207:7-15.<sup>5</sup> Second, Rebel  
 5 contends that the City was "well aware" that the Rebel/VVWD contract provided that VVWD  
 6 needed to obtain Rebel's consent before entering into a contract for any competing  
 7 telecommunications facility largely because Robert "Bubba" Smith ("Smith"), a former director of  
 8 the VVWD and member of the Mesquite City Counsel, raised the issue of repudiating the lease  
 9 agreement with the VVWD board on April 15, 2008. *Id.*, Ex. 3 at 79:17-80:13. Third, Michael  
 10 Johnson ("Johnson"), a former VVWD employee, stated that Hacker "wanted to control the water  
 11 system in Virgin Valley" and that Hacker directed Smith to contact the BLM and interested parties  
 12 regarding control of the water system in Virgin Valley. *Id.*, Ex. 18 at 1-2.<sup>6</sup>

13 The Court finds that although the City has raised a legitimate motive for its decision to  
 14 build its own communications tower, Rebel has presented evidence to create a genuine dispute  
 15 regarding whether the City's actions were fueled by motive to interfere with Rebel's contract with  
 16 the VVWD. Accordingly, the Court denies the City's Motion for Summary Judgment as to Rebel's  
 17 claims for intentional interference with contract and prospective economic advantage.

## 18 **2. Civil Conspiracy and Concert of Action**

19 The City argues that Rebel's civil conspiracy and concert of action claims are barred by the  
 20 intracorporate conspiracy doctrine, which provides that "[a]gents and employees of a corporation  
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22 <sup>5</sup> Rebel contends that this ultimatum was confirmed by the City's Public Works Director William  
 23 Tanner, but this is not supported by the cited portion of Tanner's deposition. In the cited portion of his  
 24 deposition, Tanner describes his understanding of the ultimatum: that if the site "hasn't been permitted through  
 the governing agencies then the City of Mesquite is not interested in being on that tower and we're going to  
 build our own tower." Doc. #207, Ex. 6 at 49:4-19.

25 <sup>6</sup> Rebel raised additional issues of fact—mostly based on circumstantial evidence—that it contends  
 26 support its claim for intentional interference. *See* Doc. #207 at 7-11. The Court need not discuss every stated  
 issue of fact to determine that genuine disputes of material fact exist that preclude summary judgment.

1 cannot conspire with their corporate principal or employer where they act in their official capacities  
 2 on behalf of the corporation and not individuals for their individual advantage.” *Collins v. Union*  
 3 *Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 622 (Nev. 1983). Rebel argues that the intracorporate  
 4 conspiracy doctrine does not apply because the operative agreement was between the City and  
 5 VVWD, not merely between the City’s employees.

6 To establish a concert of action claim in Nevada, plaintiff must establish that defendants  
 7 “agreed to engage in conduct that is inherently dangerous or poses a substantial risk of harm to  
 8 others.” *GES, Inc. v. Corbitt*, 21 P.3d 11, 14-15 (Nev. 2011). “Concert of action resembles the tort  
 9 of civil conspiracy.” *Id.* at 15. “Both causes of action require an agreement. To prevail in a civil  
 10 conspiracy action, a plaintiff must prove an agreement between the tortfeasors, whether explicit or  
 11 tacit.” *Id.* (internal citations omitted). “Proof of an agreement alone is not sufficient, however,  
 12 because it is essential that the conduct of each tortfeasor be in itself tortious.” *Id.*

13 The Court finds as a matter of law that Rebel’s concert of action claim against the City must  
 14 fail because no reasonable juror could find that the City’s conduct—entering into a contract with  
 15 VVWD to build a communications tower—was inherently dangerous or posed a substantial risk of  
 16 harm to others. *See Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1092-93 (D. Nev. 2012)  
 17 (granting defendants’ motion for summary judgment on a concert of action claim because  
 18 “[e]ngaging in a real estate transaction is not inherently dangerous and does not pose a substantial  
 19 risk of harm to others”).<sup>7</sup> Accordingly, the Court grants the City’s Motion for Summary Judgment  
 20 as to Rebel’s concert of action claim.

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 23 <sup>7</sup> Traditionally, this tort is “quite narrow,” as its “classic application is in the drag-racing context where  
 24 one driver is the cause-in-fact of the plaintiff’s injury and another racer bears culpability, too.” *Fakoya v.*  
 25 *County of Clark*, No. 2:12-cv-2149, 2014 WL 5020592, at \*8 (D. Nev. Oct. 8, 2014) (citing *Dow Chem. Co.*  
 26 *v. Mahlum*, 970 P.2d 98, 111-12 (Nev. 1998), *overruled on other grounds* by *Corbitt*, 21 P.3d at 15. The  
 Nevada Supreme Court added that this tort was designed to “deter antisocial or dangerous behavior” and that  
 application of the tort “is largely confined to isolated acts of adolescents in rural society.” *Mahlum*, 970 P.2d  
 at 111 (internal citations omitted).

1           However, the Court finds that Rebel has produced evidence to raise a genuine dispute as to  
2 whether the City could be liable for civil conspiracy. “To establish a claim for civil conspiracy, a  
3 plaintiff must establish: (1) the commission of an underlying tort; and (2) an agreement between the  
4 defendants to commit that tort.” *Peterson v. Miranda*, 57 F. Supp. 3d 1271, 1278 (D. Nev. 2014)  
5 (citing *Corbitt*, 21 P.3d at 15). As discussed above, the Court has denied the City’s Motion as to  
6 Rebel’s claim for intentional interference with contract or prospective business relations. Rebel has  
7 raised a dispute of fact as to whether the City and VVWD entered into an agreement to undermine  
8 the Rebel/VVWD contract. Specifically, Rebel states that Smith, a former VVWD director and  
9 member of the City’s board, raised the issue of VVWD repudiating the Rebel lease agreement with  
10 the rest of the VVWD board at an April 15, 2008, meeting. Doc. #207, Ex. 3 at 79:17-80:13.  
11 Additionally, Johnson, a former VVWD employee, stated that Hacker took affirmative steps to  
12 agitate Rebel’s lease agreement. *Id.*, Ex. 18 at 1-2. Thus, Rebel has established a dispute regarding  
13 commission of an underlying tort, and an agreement to commit that tort.

14           The City argues that the intracorporate conspiracy doctrine bars Rebel’s claim for civil  
15 conspiracy because a plaintiff cannot recover for an alleged conspiracy between a government  
16 agency and its employees acting within the scope of their employment. *See Nanopierce Techs.,*  
17 *Inc. v. Depository Trust and Clearing Corp.*, 168 P.3d 73, 85 n.49 (Nev. 2007) (quoting *Lexalt v.*  
18 *McClatchy*, 622 F. Supp. 737, 745-46 (D. Nev. 1985)) (“[B]ecause respondents are a parent  
19 company and its subsidiaries, they have no separate legal existence; thus it appears ‘impossible for  
20 a civil conspiracy to have occurred.’”). However, it appears that Rebel’s claim for civil conspiracy  
21 is based not on an agreement between the City and its agents, but rather on an alleged agreement  
22 between the City and VVWD to take action to undermine Rebel’s lease of the white rock site. As  
23 discussed above, Rebel has identified evidence that VVWD knew that the City wanted to disrupt  
24 Rebel’s contract, and may have worked with the City to facilitate this disruption. Additionally, in  
25 an email from Robycn, LLC, a consulting company the City hired to work with the BLM, Robycn

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1 partners Barry Stubbs and Mike Ford<sup>8</sup> stated that as a result of communications with the VVWD  
2 regarding its right of way, Rebel might be “out of the picture.” Doc. #207, Ex. 13.

3 Rebel has established that a genuine dispute of material fact remains as to whether the City  
4 is liable for the underlying intentional interference torts, and that the City may have conspired with  
5 the VVWD to commit those torts. Accordingly, the Court denies the City’s Motion as to Rebel’s  
6 civil conspiracy claim.

### 7 **B. VVWD’s Motion for Partial Summary Judgment**

8 VVWD moves for summary judgment on its counterclaim for declaratory judgment, and  
9 Rebel’s claims for fraudulent inducement, breach of contract, breach of the implied covenant of  
10 good faith and fair dealing, civil conspiracy, concert of action, conversion, and intentional  
11 interference with prospective economic advantage. Doc. #193.

#### 12 **1. Declaratory Judgment**

13 VVWD seeks a declaratory judgment that, under the Lease Agreement, Rebel “was  
14 responsible for compliance with requirements of the BLM for the intended use of the tower; that  
15 Rebel breached the Lease Agreement by failing to take steps to comply with requirements of the  
16 BLM for advance approval; and that Rebel is liable for the District’s damages caused by the  
17 breach.” Doc. #196 at 5. Rebel argues that VVWD is not entitled to declaratory judgment because  
18 any actions that the VVWD interprets as a breach of the contract were a result of the VVWD’s false  
19 representation regarding the contract to Rebel.

20 The Declaratory Judgment Act provides that a federal court “may declare the rights and  
21 other legal relations of any interested party seeking such declaration, whether or not further relief is  
22 or could be sought.” 28 U.S.C. § 2201(a). Under this Act, a court may grant declaratory relief “in  
23 a case . . . within its jurisdiction.” *Id.* Thus, federal jurisdiction under the Declaratory Judgment  
24 Act implicates the usual requirements of federal subject matter jurisdiction, including the necessity  
25 of a “case or controversy” justiciable under Article III of the U.S. Constitution. *See MedImmune*

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26 <sup>8</sup> Ford is a former Deputy Director of the BLM in the state of Nevada. Doc. #207, Ex. 28.

1 *Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007). A justiciable case or controversy exists if there  
2 is “a substantial controversy, between parties having adverse legal interests, of sufficient  
3 immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* at 127 (quoting *Md.*  
4 *Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

5 The Lease Agreement states: “At its own cost, [Rebel] shall comply with all statutes,  
6 ordinances, regulations, and requirements of all federal, state, county, and local government entities  
7 insofar as they relate to the use of the premises on which the Improvements are placed.” Doc.  
8 #193, Ex. A at 3. VVWD states that this language indicates that Rebel had the responsibility to  
9 ensure that its actions on the white rock site complied with the BLM’s requirements, and all other  
10 regulations. Rebel counters that VVWD represented that it owned the white rock site, and  
11 warranted that the leased portions were not subject to any administrative or regulatory guidelines  
12 concerning wetlands or endangered species. Indeed, Section 21(e) of the Lease Agreement states  
13 that the property is “not subject to any administrative order or any judgement or decree, including  
14 any order concerning wetlands or endangered or threatened species.” Doc. #193, Ex. A at 5.

15 Reading the lease agreement in its entirety, it is not likely that Rebel was completely  
16 unaware that the land was owned by the BLM; Section 24 of the agreement states that “if the BLM  
17 terminates [VVWD’s] permit covering the premises, the BLM shall succeed to the right, title, and  
18 interest of Lessor hereunder, and the BLM shall have the unilateral right to terminate this  
19 Agreement at any time thereafter.” Doc. #193, Ex. A at 6. However, the question before the Court  
20 is whether failure to request permission from the BLM to build a communications tower constituted  
21 a breach of the lease agreement. The Court finds that the contract is ambiguous because it states  
22 that Rebel had an obligation to comply with all statutes and ordinances, but also that Rebel “shall  
23 construct a separately fenced and accessed telecommunication tower,” and that VVWD had  
24 authority to execute the agreement. *Id.* at 2, 5. Accordingly, the Court denies VVWD’s Motion for  
25 Summary Judgment on its claim for declaratory judgment.

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## 2. Fraudulent Inducement

Rebel argues that the lease agreement with VVWD included four misrepresentations that support Rebel's claim for fraudulent inducement: (1) VVWD had the authority to enter into the lease agreement; (2) the white rock site was "not subject to any administrative order or any judgment or decree, including any order concerning wetlands or endangered or threatened species"; (3) VVWD was prohibited from entering into any other leases or agreements without Rebel's consent; and (4) VVWD's right of way allowed for the construction of a communications tower. VVWD argues that the Court should grant summary judgment on its claim for fraudulent inducement because its representations in the lease agreement were either not fraudulent, or did not improperly intend to induce reliance.

To establish a claim for fraudulent inducement, the plaintiff must prove by clear and convincing evidence: (1) false representation by the defendant; (2) defendant's knowledge or belief that the representation was false; (3) defendant's intention to induce plaintiff to consent to the contract's formation; (4) plaintiff's justifiable reliance on the misrepresentation; and (5) damage resulting from defendant's reliance. *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 89 P.3d 1009, 1018 (Nev. 2004). Fraud "is never presumed; it must be clearly and satisfactorily proved." *Id.* (quoting *Havas v. Alger*, 461 P.2d 857, 860 (Nev. 1969)).

Although it appears that at least one representation by VVWD in the lease agreement was false, Rebel has not identified more than a scintilla of evidence that VVWD had knowledge of any such misrepresentation when the agreement was formed, or that VVWD intended to induce Rebel's reliance based on these misrepresentations. First, Rebel has not identified any evidence that VVWD knew that its right of way did not permit leasing the white rock site to Rebel. In fact, VVWD's original right of way permit with the BLM does not state that VVWD did not have authority to lease the property to third parties. *See* Doc. #193, Ex. B. Second, Rebel states that VVWD's chief hydrologist Michael Johnson was aware "that leased portions of the White Rock Site were actually subject to a BLM restriction, which identified the White Rock Site as an area of

critical environmental concern.” Doc. #210 at 5. However, in the portion of the deposition identified by Rebel, Johnson notes that he was aware that the white rock site was an area of environmental concern on April 17, 2008, approximately one year after VVWD and Rebel entered into the lease agreement—on April 15, 2007. *See* Doc. #195, Ex. 6 at 43:1-15.<sup>9</sup> Rebel has not identified any evidence that VVWD was aware of this information at the time the lease agreement was signed. Third, whether VVWD entered into leases or agreements without Rebel’s consent in contravention of the lease agreement is relevant to Rebel’s breach of contract claim, not its fraudulent inducement claim.

Based on the foregoing, Rebel has not identified more than a scintilla of evidence that VVWD knew that alleged misrepresentations in the lease agreement were false, or that VVWD made such misrepresentations to induce Rebel’s reliance. *See Liberty Lobby*, 477 U.S. at 252. Accordingly, the Court grants VVWD’s Motion as to Rebel’s fraudulent inducement claim.

### 3. Breach of Contract

VVWD argues that it cannot be liable for breach of contract based on the lease agreement because any alleged damages were caused by Rebel’s own initial breach. Rebel contends that VVWD’s argument is conclusory, and points to disputed and undisputed evidence that it claims supports that VVWD should be held liable for breach of contract.

To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a valid contract; (2) that plaintiff performed or was excused from performance; (3) a breach by the defendant; and (4) damages resulting from defendant’s breach. *See* Restatement (Second) of Contracts § 203 (2007); *see also Saini v. Int’l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 405 (1865)). “Whether a party has breached a contract and whether the breach is material are questions of fact.” *Las Vegas Sands, LLC v.*

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<sup>9</sup> It appears that Rebel inadvertently omitted the relevant pages—42 and 43— of Johnson’s deposition from its exhibits in opposition to VVWD’s Motion. *See* Doc. #210, Ex. 6. However, page 43 of Johnson’s deposition was included with Rebel’s statement of facts submitted with its own Motion for Summary Judgment. Doc. #195, Ex. 6.

1 *Nehme*, 632 F.3d 526, 536 (9th Cir. 2011) (citing *Hoffman v. Eighth Judicial District Court*, 823  
 2 P.2d 848, 850 (Nev. 1974)). However, “[i]nterpretation of a contract is a matter of law,” and  
 3 summary judgment “is appropriate when the contract terms are clear and unambiguous, even if the  
 4 parties disagree as to their meaning.” *United States v. King Features Entm’t, Inc.*, 843 F.2d 394,  
 5 398 (9th Cir. 1988).

6 The Court finds that Rebel has raised a genuine dispute of material fact on its breach of  
 7 contract claim. First, the lease agreement was a valid contract between Rebel and VVWD.  
 8 Second, as discussed above, VVWD has not established that it was excused from performance  
 9 when Rebel built the tower without express permission from the BLM. Third, Rebel has raised a  
 10 dispute as to whether VVWD breached the contract; one such potential breach Rebel identifies is  
 11 that VVWD unilaterally terminated the contract without notifying Rebel, in violation of an express  
 12 provision of the lease agreement.<sup>10</sup> Doc. #193, Ex. A at 4. Fourth, Rebel suffered damages  
 13 because the amendment to VVWD’s right of way extinguished its rights under the lease agreement.  
 14 Accordingly, the Court denies VVWD’s Motion as to Rebel’s breach of contract claim.

#### 15 **4. Breach of the Implied Covenant of Good Faith and Fair Dealing**

16 “It is well established that all contracts impose upon the parties an implied covenant of good  
 17 faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the  
 18 disadvantage of the other.” *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Where one party to a  
 19 contract “deliberately contravenes the intention and spirit of the contract, that party can incur  
 20 liability for breach of the implied covenant of good faith and fair dealing.” *Hilton Hotels v. Butch*  
 21 *Lewis Prods.*, 808 P.2d 919, 923 (Nev. 1991). To succeed on a claim for breach of the implied  
 22 covenant of good faith and fair dealing, plaintiff must (1) identify the contract that is the basis for  
 23 the claim, (2) identify the conduct that allegedly constituted the breach of the covenant, (3) indicate  
 24 that this conduct was deliberate, and (4) show how the alleged breach caused damage. *See Morris*

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25 <sup>10</sup> Rebel also identifies VVWD’s act amending its right of way for the white rock site despite the lease  
 26 agreement’s language requiring that VVWD could not “enter into any leases or agreements affecting the leasing  
 or management of the Improvements without Lessee’s consent.” Doc. #193, Ex. A at 6.

1 *v. Bank of Am. Nev.*, 886 P.2d 454, 457 (Nev. 1994). A defendant can be liable for breach of the  
 2 implied covenant of good faith and fair dealing even if it is determined that the defendant did not  
 3 breach the underlying contract. *Morris*, 866 P.2d at 457 n.2 (“Whether a breach of the *letter* of the  
 4 contract exists or not, the implied covenant of good faith is an obligation independent of the  
 5 consensual contractual covenants.”).

6 Rebel has raised a genuine dispute of material fact regarding whether VVWD’s actions  
 7 support its claim for breach of the implied covenant of good faith and fair dealing. For example,  
 8 after the BLM issued its notice of trespass to Rebel, VVWD acknowledged its responsibility for the  
 9 trespass issue, stated that it would attempt to resolve the problem, and entered into an amendment  
 10 with the BLM that essentially extinguished Rebel’s rights to the white rock site. *See* Doc. #193,  
 11 Ex. D (“VVWD may not sub-lease or otherwise authorize use of public lands.”). This conduct  
 12 raises a genuine dispute of material fact regarding whether VVWD deliberately acted to undermine  
 13 the contract. Accordingly, the Court denies VVWD’s Motion as to Rebel’s claim for breach of the  
 14 implied covenant of good faith and fair dealing. *See Morris*, 886 P.2d at 457.

#### 15 **5. Intentional Interference with Prospective Economic Advantage**

16 VVWD argues that Rebel’s claim for intentional interference with prospective economic  
 17 advantage against VVWD is barred because of Rebel’s own breach in building the communications  
 18 tower without seeking permission from the BLM. Rebel argues that to survive summary judgment,  
 19 it need only establish a genuine dispute as to whether the VVWD intended to interfere with Rebel’s  
 20 prospective economic advantage, and that it has raised such a dispute.

21 To succeed on an intentional interference claim, the plaintiff must establish: (1) existence of  
 22 a valid contract; (2) the defendant’s knowledge of the contract; (3) acts intended or designed to  
 23 disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage.”  
 24 *J.J. Indus.*, 71 P.3d at 1267. Additionally, “the plaintiff must establish that the defendant had a  
 25 motive to induce breach of the contract with the third party.” *Id.* at 1268. An actor’s “interference  
 26 with the other’s prospective contractual relation is intentional if the actor desires to bring it about or

1 if he knows that the interference is certain or substantially certain to occur as a result of his action.”  
 2 *Las Vegas-Tonopah-Reno Stage Line*, 792 P.2d at 388.

3 The Court has already found that there remains a genuine dispute as to whether a valid  
 4 contract existed when VVWD took actions that allegedly interfered with Rebel’s prospective  
 5 business advantage. Thus, the question before the Court is whether VVWD intended to disrupt the  
 6 contract. Rebel has identified evidence to support its claim. For example, after BLM issued its  
 7 trespass notice, VVWD stated that it took full responsibility and that it would attempt to resolve the  
 8 situation with the BLM. Doc. #210, Ex. 9. VVWD then entered into a settlement agreement with  
 9 the BLM, took full responsibility, and paid a penalty for Rebel’s unauthorized use of the white rock  
 10 site. *Id.*, Ex. 10. Additionally, the agreement stated that “all rights-of-ways and leases issued to  
 11 VVWD by the BLM are for the sole purpose of the use described in said authorization and that  
 12 VVWD may not sub-lease or otherwise authorize use of public lands.” *Id.* This agreement with  
 13 the BLM indicates that VVWD was at least substantially certain that interference with the Rebel  
 14 contract would occur when it entered into the settlement agreement with the BLM. *See Las Vegas-*  
 15 *Tonopah-Reno Stage Line*, 792 P.2d at 388.

16 Thus, the only remaining question is whether VVWD’s alleged conduct was tortious. As  
 17 discussed above, Rebel has raised a genuine dispute as to whether VVWD’s conduct breached the  
 18 implied covenant of good faith and fair dealing. A jury could therefore find that VVWD’s  
 19 intentional acts that undermined the Rebel/VVWD lease agreement were tortious. Accordingly, the  
 20 Court denies VVWD’s Motion as to Rebel’s claim for intentional interference with prospective  
 21 economic advantage.

## 22 **6. Conversion**

23 Under Nevada law, “conversion occurs when a person exerts wrongful dominion over  
 24 another’s personal property without permission.” *Med. Providers Fin. Corp. II v. New Life*  
 25 *Centers, LLC*, 818 F. Supp. 2d 1271, 1276 (D. Nev. 2011) (citing *Evans v. Dean Witter Reynolds,*  
 26 *Inc.*, 5 P.3d 1043, 1048 (Nev. 2000)). “[T]he tort typically involves wrongful taking and carrying

1 away of something tangible.” *Id.* (quoting *Reliance Ins. Co. v. U.S. Bank of Wash., N.A.*, 134 F.3d  
 2 502, 506 (9th Cir. 1998)). “[C]onversion is an act of general intent, which does not require  
 3 wrongful intent and is not excused by care, good faith, or lack of knowledge.” *Evans*, 5 P.3d at  
 4 1048. “Whether a conversion has occurred is generally a question of fact for the jury.” *Id.*

5 VVWD argues that it cannot be liable for conversion because it has not exerted dominion  
 6 over the communications tower: “While perhaps not practical, subject to any requirement of the  
 7 BLM in connection therewith, Rebel has been and is free to come and take the tower away.” Doc.  
 8 #196 at 12. However, a reasonable jury could find that by taking responsibility for the BLM’s  
 9 notice of trespass and amending its right of way to extinguish Rebel’s rights to the white rock site,  
 10 VVWD exerted dominion over Rebel’s property for purposes of a conversion claim. Noting that  
 11 conversion generally involves questions of fact for the jury, the Court denies VVWD’s Motion as  
 12 to Rebel’s conversion claim. *See Evans*, 5 P.3d at 1048.

### 13 7. Condemnation

14 Rebel argues that VVWD improperly appropriated Rebel’s property without compensation  
 15 for public use when VVWD secured the exclusive rights to use the white rock site and  
 16 communications tower in the amendment to VVWD’s right of way. VVWD contends that Rebel’s  
 17 condemnation claims are merely mischaracterized contractual claims, and that Rebel’s property  
 18 was not “taken” by VVWD “for public use.”

19 Article I § 8(6) of the Nevada Constitution provides that “[p]rivate property shall not be  
 20 taken for public use without just compensation having been first made, or secured, except in cases  
 21 of war, riot, fire, or great public peril, in which case compensation shall be afterward made.”  
 22 “Inverse condemnation is an ‘action against a governmental defendant to recover the value of  
 23 property which has been taken in fact by the governmental defendant, even though no formal  
 24 exercise of the power of eminent domain has been attempted by the taking agency.’” *State Dep’t of*  
 25 *Transp. v. Cowan*, 103 P.3d 1, 3 (Nev. 2004) (quoting *Thornburg v. Port of Portland*, 376 P.2d  
 26 100, 101 n.1 (Or. 1962)). “A taking can arise when the government regulates or physically

1 appropriates an individual's private property." *ASAP Storage, Inc. v. City of Sparks*, 173 P.3d 734,  
 2 740 (Nev. 2007). "Physical appropriation exists when the government seizes or occupies private  
 3 property or ousts owners from their private property." *Id.* "A physical appropriation by ouster  
 4 occurs when the government substantially interferes with an owner's right of access to his or her  
 5 property." *Id.*

6 Rebel has raised a genuine dispute of material fact as to whether VVWD's actions  
 7 constituted appropriation of Rebel's land without just compensation. Specifically, VVWD stated  
 8 that it would attempt to resolve the trespass issue with the BLM, and then entered into an  
 9 amendment of its right of way for the white rock site that effectively revoked Rebel's rights to the  
 10 property. Doc. #210, Ex. 9; Doc. #193, Ex. D. Under Nevada law, this could constitute substantial  
 11 interference with a right of access to property. *See ASAP Storage*, 173 P.3d at 740. Accordingly,  
 12 the Court denies VVWD's Motion as to Rebel's condemnation claims.

### 13 **8. Concert of Action**

14 As discussed above, a plaintiff cannot establish a claim for concert of action without  
 15 establishing that the defendant's conduct is inherently dangerous or poses a substantial risk of harm  
 16 to others. *See Corbitt*, 21 P.3d at 14-15. Plaintiff cannot establish that a contract for a lease of  
 17 property poses such a danger or substantial risk. *See Tai-Si Kim*, 838 F. Supp. 2d at 1092-93 (D.  
 18 Nev. 2012) (granting defendants' motion for summary judgment because "[e]ngaging in a real  
 19 estate transaction is not inherently dangerous and does not pose a substantial risk of harm to  
 20 others"). Accordingly, the Court grants VVWD's Motion as to Rebel's concert of action claim.

### 21 **9. Civil Conspiracy**

22 "To establish a claim for civil conspiracy, a plaintiff must establish: (1) the commission of  
 23 an underlying tort; and (2) an agreement between the defendants to commit that tort." *Peterson*, 57  
 24 F. Supp. 3d at 1278 (citing *Corbitt*, 21 P.3d at 15). Rebel has raised a genuine dispute of material  
 25 fact regarding whether VVWD committed the torts of breach of the implied covenant of good faith  
 26 and fair dealing, intentional interference with prospective economic advantage, and conversion.

1 Additionally, Rebel has raised a genuine dispute regarding whether VVWD entered into an  
 2 agreement with the City to commit the tort of intentional interference with prospective business  
 3 advantage. Accordingly, the Court denies VVWD's Motion as to Rebel's claim for civil  
 4 conspiracy.

### 5 **C. Rebel's Motion for Partial Summary Judgment**

6 Rebel moves for summary judgement on its breach of contract, breach of the implied  
 7 covenant of good faith and fair dealing, and fraudulent inducement claims against VVWD. Doc.  
 8 #194 at 1.

#### 9 **1. Breach of Contract**

10 The Rebel/VVWD lease agreement provides that if either party defaults under the  
 11 agreement, VVWD must provide Rebel written notice and an opportunity to cure. Doc. #195, Ex. 1  
 12 at 4. If, after notice of default, Rebel failed to cure, then VVWD would have a right to terminate  
 13 the agreement upon written notice to Rebel. *Id.* Rebel argues that VVWD breached this provision  
 14 of the agreement when it unilaterally terminated the lease agreement—in entering into the right of  
 15 way amendment with the BLM—without notifying Rebel. VVWD argues that it was excused from  
 16 performance under the contract because the BLM made such performance impossible, and  
 17 providing written notice to Rebel would have been futile.

18 To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of  
 19 a valid contract; (2) that plaintiff performed or was excused from performance; (3) a breach by the  
 20 defendant; and (4) damages resulting from defendant's breach. *See* Restatement (Second) of  
 21 Contracts § 203 (2007); *see also Saini*, 434 F. Supp. 2d at 919-20. “Under Nevada law, ‘[a] breach  
 22 of contract may be said to be a material failure of performance of a duty arising under or imposed  
 23 by agreement.’” *Las Vegas Sands*, 632 F.3d at 536 (quoting *Bernard v. Rockhill Dev. Co.*, 734 P.2d  
 24 1238, 1240 (Nev. 1987)). “Whether a party has breached a contract and whether the breach is  
 25 material are questions of fact.” *Id.* (citing *Hoffman*, 823 P.2d at 850). However, “[i]nterpretation  
 26 of a contract is a matter of law,” and summary judgment “is appropriate when the contract terms

1 are clear and unambiguous, even if the parties disagree as to their meaning.” *King Features*  
2 *Entm’t*, 843 F.2d at 398.

3 The Court finds that there remains a genuine dispute of material fact regarding whether  
4 VVWD’s obligation under the lease agreement was discharged by impossibility. “Generally, the  
5 defense of impossibility is available to a promisor where his performance is made impossible or  
6 highly impractic[al] by the occurrence of unforeseen contingencies.” *Nebaco, Inc. v. Riverview*  
7 *Realty Co.*, 482 P.2d 305, 307 (Nev. 1971). VVWD argues that the BLM’s actions made  
8 performance under the lease agreement impossible, and that the BLM’s intervention was not  
9 foreseeable. There remains a factual question regarding whether VVWD knew that the BLM  
10 originally intended to prohibit VVWD from leasing the white rock site to third parties. If VVWD  
11 was not aware of BLM’s restrictive view of the right of way, then this would support VVWD’s  
12 argument that BLM’s intervention was not foreseeable. *See Las Vegas Sands*, 632 F.3d at 536  
13 (finding that whether a party breached or whether a breach was material is a factual question); *Am.*  
14 *Heritage, Inc. v. Native Am. Dev. and Consulting Servs., Inc.*, No. 2:05-cv-0942, 2007 WL 956887  
15 at \*1 (D. Nev. Mar. 29, 2007) (finding that impossibility of performance raised a question of fact to  
16 preclude summary judgment). Accordingly, the Court denies Rebel’s Motion for Summary  
17 Judgment as to its breach of contract claim.

## 18 **2. Breach of Implied Covenant of Good Faith and Fair Dealing**

19 “It is well established that all contracts impose upon the parties an implied covenant of good  
20 faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the  
21 disadvantage of the other.” *Nelson*, 163 P.3d at 427. Where one party to a contract “deliberately  
22 contravenes the intention and spirit of the contract, that party can incur liability for breach of the  
23 implied covenant of good faith and fair dealing.” *Butch Lewis Prods.*, 808 P.2d at 923.

24 Rebel argues that it is entitled to summary judgment on its claim for breach of the implied  
25 covenant of good faith and fair dealing because (1) the parties entered into a contract; (2) VVWD  
26 owed Rebel a duty of good faith and fair dealing; (3) VVWD breached the contract; and (4) Rebel

1 suffered harm. *See* Doc. #194 at 8-9. Rebel has not identified any evidence to resolve the disputed  
2 question of whether VVWD deliberately contravened the spirit of the contract. Accordingly, the  
3 Court denies Rebel's Motion as to its claim for breach of the implied covenant of good faith and  
4 fair dealing.

### 5                   **3.       Fraudulent Inducement**

6           To establish a claim for fraudulent inducement, the plaintiff must prove by clear and  
7 convincing evidence: (1) false representation by the defendant; (2) defendant's knowledge or belief  
8 that the representation was false; (3) defendant's intention to induce plaintiff to consent to the  
9 contract's formation; (4) plaintiff's justifiable reliance on the misrepresentation; and (5) damage  
10 resulting from defendant's reliance. *J.A. Jones Constr. Co.*, 89 P.3d at 1018. As discussed above,  
11 the Court has granted VVWD's Motion for Summary Judgment as to Rebel's claim for fraudulent  
12 inducement because Rebel has not identified more than a scintilla of evidence that VVWD knew  
13 that its contract with Rebel included misrepresentations, or that VVWD intended to induce reliance  
14 on false information. Accordingly, the Court denies Rebel's Motion as to its claim for fraudulent  
15 inducement.

### 16                   **D. Defendants' Motion to Exclude Expert Testimony**

17           On February 11, 2013, Rebel disclosed Douglas Radtke ("Radtke"), an employee of  
18 Spectrum Economics, as its damages expert. Radtke prepared a report that concluded that Rebel  
19 suffered \$1,880,856.72 in total damages as a result of VVWD's alleged conduct. *See* Doc. #198,  
20 Ex. C. Radtke left Spectrum before VVWD had an opportunity to depose him. Although Rebel  
21 did not change its witness designation, Rebel made another Spectrum employee available for  
22 deposition on June 18, 2014—Eric C. Frye ("Frye"). *See id.*, Ex. D. VVWD argues that the Court  
23 should exclude Frye's testimony because he was not properly disclosed as a witness, did not  
24 substantially contribute to Radtke's damages report, and his opinions were not based on reliable  
25 methods.<sup>11</sup> Rebel argues that Frye's testimony should not be excluded because he participated in  
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<sup>11</sup> The City filed a joinder to VVWD's Motion to Exclude Frye's testimony. Doc. #200.

1 the preparation of Radtke's report, and his testimony would be helpful to the jury.

2 Federal Rule of Evidence 702 provides that:

3 A witness who is qualified as an expert by knowledge, skill, experience, training, or  
4 education may testify in the form of an opinion or otherwise if: (a) the expert's  
5 scientific, technical, or other specialized knowledge will help the trier of fact to  
6 understand the evidence or to determine a fact in issue; (b) the testimony is based on  
sufficient facts or data; (c) the testimony is the product of reliable principles and  
methods; and (d) the expert has reliably applied the principles and methods to the  
facts of the case.

7 The Ninth Circuit has interpreted this rule to require that expert testimony "be both relevant and  
8 reliable." *United States v. Vallejo*, 237 F.3d 1008, 1019 (9th Cir. 2001). "Relevancy simply  
9 requires that '[t]he evidence . . . logically advance a material aspect of the party's case.'" *Estate of*  
10 *Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (quoting *Cooper v. Brown*, 510  
11 F.3d 870, 942 (9th Cir. 2007)).

12 A trial court "is not required to rigidly apply the specific factors relating to expert scientific  
13 evidence to cases involving expert specialized knowledge evidence." *Visa Int'l Serv. Ass'n v. JSL*  
14 *Corp.*, No. 2:01-cv-0294, 2006 WL 3248394, at \*2 (D. Nev. Nov. 7, 2006) (citing *United States v.*  
15 *Hankey*, 203 F.3d 1160, 1168-69 (9th Cir. 2000)). For specialized non-scientific testimony like  
16 Frye's, the district court therefore exercises its gate-keeping function by analyzing the expert's  
17 reliability, which "depends heavily on the knowledge and experience of the expert, rather than the  
18 methodology or theory behind" the testimony. *Hankey*, 203 F.3d at 1169. To determine whether  
19 specialized expert testimony is admissible, the court considers: (1) whether the opinion is based on  
20 scientific, technical, or other specialized knowledge; (2) whether the opinion would assist the trier  
21 of fact in understanding the evidence or determining a fact in issue; (3) whether the expert has the  
22 appropriate qualifications to render the opinion; (4) whether the testimony is relevant and reliable;  
23 (5) whether the methodology or technique used fits the conclusions; and (6) whether the opinion's  
24 probative value is substantially outweighed by the risk of unfair prejudice, confusion of issues or  
25 undue consumption of time. *Hankey*, 203 F.3d at 1168.

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1           Importantly, Rebel has not formerly substituted Frye as a replacement expert witness for  
2 Radtke. Additionally, Rebel has not submitted a report describing Frye's experience and a  
3 summary of the content of his intended testimony.<sup>12</sup> Without such a report, the Court cannot  
4 determine that Frye has the experience and knowledge necessary to be an expert witness, or that his  
5 testimony would be helpful to the jury. Accordingly, the Court grants Defendants' Motion to  
6 Exclude Frye's testimony without prejudice.

7 **IV. Conclusion**

8           IT IS THEREFORE ORDERED that the City's Motion for Summary Judgment (Doc. #192)  
9 is GRANTED in part and DENIED in part.

10           IT IS FURTHER ORDERED that VVWD's Motion for Partial Summary Judgment (Doc.  
11 #193) is GRANTED in part and DENIED in part.


12           IT IS FURTHER ORDERED that Rebel's Motion for Partial Summary Judgment (Doc.  
13 #194) is DENIED.

14           IT IS FURTHER ORDERED that Defendants' Motion to Exclude Frye's Testimony (Doc.  
15 #198) is GRANTED without prejudice.

16           IT IS FURTHER ORDERED that the parties shall file a joint pre-trial order with the Court  
17 pursuant to Local Court Rules 16-3 and 16-4 on or before September 1, 2015.

18           IT IS SO ORDERED.

19           DATED this 9th day of July, 2015.

20   
21 LARRY R. HICKS  
22 UNITED STATES DISTRICT JUDGE  
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26 <sup>12</sup> Rebel attached Frye's CV to its Opposition to Defendants' Motion to Exclude Frye. Doc. #215, Ex. 2. However, a CV alone is insufficient to establish Frye as a competent witness. *See* Fed. R. Civ. P. 26(a)(2)(b) (stating requirements for expert witnesses who are retained or specially employed to provide expert testimony).